56761-6

56761-6

80368-4

NO. 56761-6

King County Superior Court Cause No. 03-2-41520-1 SEA

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NCF FINANCIAL, INC., a Washington corporation,
Plaintiff/Appellant

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Minnesota corporation,
Defendant/Respondent

REPLY BRIEF OF APPELLANT

Attorneys for Plaintiff/Appellant NCF Financial, Inc.

David M. Tall
Oseran Hahn Spring & Watts, P.S.
10900 NE Fourth Street #850
Bellevue WA 98004
425-455-3900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Washington Cases

Federal Cases

Other Cases

Appendix

I. ARGUMENT

A. The Disappearance-Inventory Exclusion is not Applicable to the Factual Pattern Present in the Case at Bar as NCF as the Claimant Never Lost the Equipment and it never Disappeared or Became Missing while in NCF's Possession.

Respondent St. Paul fails to comprehend the essence of NCF's argument with respect to the disappearance clause. NCF's argument, in actuality, is quite simple. NCF, as an additional insured, had the right to make a direct claim against St. Paul. St. Paul, as the insurer, had to treat NCF as the insured under the insurance contract for purposes of the loss. Therefore, any provision of the insurance contract had to be interpreted as it applied to NCF, not as it applied to Emerald Solutions, which was not the claimant for this loss.

Thus, the disappearance clause, as applied to NCF, would only be operative if NCF could not explain what it did with the property. The property was never missing from NCF. NCF arranged for delivery of the subject equipment to Emerald Solutions, which entity acknowledged receipt of all of the equipment. NCF knew exactly what it did with the property, namely arranging for the delivery of that equipment to Emerald Solutions. Thereafter, after rejection of the leases, Emerald Solutions failed to return all of the equipment. NCF knew exactly what happened to the equipment. It was delivered to Emerald Solutions and Emerald

Solutions, for whatever reason, did not return all of the equipment to NCF. Thus, whatever the reason Emerald Solutions had for not returning the equipment, namely, whether it was thrown out, destroyed, stolen or whatever, is a smoke screen and irrelevant. Emerald Solutions is not the claimant. If, however, Emerald Solutions was the claimant, it would have had to explain how the property became missing while in its possession.

In misunderstanding NCF's argument, St. Paul relies heavily on the California decision of Blasiar, Inc. v. Firemen's Fund Ins. Co., 76 Cal. App. 4748, 90 Cal. Rptr. 2d 374 (1999). While the language of the disappearance exclusion in Blasiar is similar to the St. Paul exclusion, the fact pattern is wholly distinguishable. In Blasiar it was property of the claimant which was lost in its own warehouse. Indeed, in all other cases cited by St. Paul, that is the consistent fact pattern; namely, the claimant is the entity which suffered loss of its property while in its possession.

This is a critical distinction because it is completely logical for the insurance company to insert an exclusion which relates to disappearance of property while in the possession of the claimant. Without such exclusion, insureds could easily make claims for property which allegedly was lost to perpetrate a fraud upon the insurance company. Thus, the exclusion is designed to prevent a fraud.

NCF, on the other hand, cited cases with fact patterns in which the injured party did not have possession of the property when it was lost.

For example, in Miller v. Boston Ins. Co., 420 P.A. 566, 218 A.2d 275 (1966) a jewelry dealer brought a claim against his insurance coverage. That dealer had consigned the ring to a second dealer who in turn consigned the ring to a third dealer. While in possession of the third dealer, that third dealer died and the ring was never found.

In McCormick & Co. v. Empire Ins. Group, 690 F. Supp 1212 (1988), the matter involved pepper which was being held by the bailee warehouseman which was unable to deliver it on demand to the bailor and had no explanation of what happened to it.

In Libralter Plastics, Inc. v. Chubb Group of Ins., 199 Mich. App. 482, 502 N.W.2d 742 (1992) it was the plaintiff's customer's injunction molds which were lost and the plaintiff was unable to explain to the customer what happened to them.

In each of these circumstances, it was property of others which was lost. As with the fact patterns of the cited cases, NCF did not have possession of the property to lose it or have it disappear or become missing while in its possession. The physical evidence of what happened to the property was quite literally the acknowledged receipt of the same by

Emerald Solutions. Accordingly, NCF's ignorance of what Emerald Solutions did with the property was completely understandable, but that ignorance did not make the disappearance exclusion operative to bar NCF's direct claim for its loss.

The Trial Court's error was that it applied the exclusion as if Emerald Solutions was the claimant and not NCF. If Emerald Solutions was the claimant, it would had to have explained what it did with its property. NCF did explain what it did with its property.

B. St. Paul's Claim that NCF's Loss is Only for Property which was not Returned is Fallacious, Misstates the Record and Takes Testimony Completely out of Context.

St. Paul does not dispute what NCF pointed out in its appeal brief, namely that it failed to properly include the full portion of an answer to interrogatory which was signed by NCF's managing agent under oath. That answer to interrogatory clearly showed NCF's intent to make a claim for property which was returned but damaged.

The Declarations of Steve White and Joe Vitulli clearly supported such claim as well with particularity.

In addition, the materials provided to St. Paul to support the claim clearly referenced property in a damaged state ("dead on arrival") from the outset of the claim.

Joe Vitulli testified under oath at a bankruptcy hearing, the Findings of Fact of which were included in a decision which was attached as Exhibit I to the Declaration of Lawrence Gottlieb in Support of Defendant St. Paul Fire & Marine Ins. Company's Motion for Summary Judgment. CP 41, pgs. 176-181. In those findings the Honorable Trish M. Brown made the following finding:

> Joseph Vitulli, NCF's Vice President, testified that the missing equipment had a value of $1,161,148.35. He testified that he arrived at this figure by compiling a list of the missing or damaged equipment ...

CP 41, pg. 188.

In addition, Judge Brown noted the following:

> The debtor in possession arranged for the return of the leased items to NCF. NCF personnel inventoried and tested each piece of returned equipment upon receipt. NCF contends that the debtor in possession failed to return much of the equipment described in the lease schedules or return the equipment in damaged condition.

CP 41, pg. 177.

Clearly, there was overwhelming evidence to, at the very least, establish a question of fact with respect to whether NCF's claim included a claim for property which was returned in a damaged state.

Moreover, as is clear from the record of the proceedings, the Trial Court did not consider the claim for property which was returned in a damaged state.

Contrary to St. Paul's argument, there was a mountain of additional testimony which explained NCF's actual claim. If there was a contradiction in testimony, it was not for the Trial Court to decide the credibility of the witness on summary judgment, but rather the Trier of Fact at trial. No matter how St. Paul attempts to spin the evidence presented at summary judgment, it is clear that the Trial Court failed to focus on this aspect of the claim in rendering its decision, and this portion of the claim should have been remanded for trial.

C. Contrary to the St. Paul Assertion, NCF has never Asserted Rights Superior to the Named Insured.

St. Paul asserts in its appeal brief that NCF claimed that the disappearance clause did not apply to it because it was not the named insured. The fact that this argument was inserted in the appeal brief highlights St. Paul's failure to comprehend the essence of NCF's argument. NCF has never asserted rights superior to the named insured in this litigation. It has claimed, supported by law that as an additional insured it had the right to make a direct claim against St. Paul. As such, the insurance contract had to be interpreted as it applied to NCF. Thus, it

was never disputed that the disappearance clause was an exclusion in the insurance contract under which NCF was making its claim. NCF's argument was that the disappearance clause was not operative under the factual pattern present, as the equipment for which NCF was making its claim of loss never disappeared or became missing while in NCF's possession. Therefore, the clause simply did not come into play as NCF could explain exactly what it did with the property; namely, caused the delivery of the same to Emerald Solutions which acknowledged receipt of the same, but failed to return it.

D. St. Paul's Motion to Strike was Nothing more than a Red Herring to Distract the Trial Court's Attention.

The Trial Court determined that the disappearance clause barred NCF's claim. NCF did provide substantial evidence from the records of the insurance company and the bankruptcy file to the contrary, of which the Court could have taken notice. Washington Courts have repeatedly recognized that all facts must be construed in the most favorable light to the non-moving party and all inferences flowing therefrom. See, Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982). It is respectfully argued that the Trial Court failed to apply this standard.

It is further respectfully argued that even if the Court adopted the Blasiar rationale, it failed to recognize that only some tangible facts and

circumstances were necessary to shift the burden to the insurance company under Blasiar.

St. Paul's attempt to label that testimony, which was prejudicial to its case, as hearsay and speculation is certainly understandable to further its cause, but labeling the same does not make such evidence hearsay and/or speculation.

A simple review of St. Paul's motion to strike reveals the weakness of the claims made therein. By way of one illustration, St. Paul attempted to strike the opposing memorandum of NCF on the basis that it did not comply with a format mandated by procedural rule, which was not only unfounded, but indeed the format used by NCF, was consistent with opposition briefs filed by St. Paul in this very litigation.

Clearly, the motion to strike was nothing but a smoke screen which was correctly disregarded.

E. St. Paul's Argument that Equipment must be Damaged in Order to be a Loss under the Contract's Insuring Agreement is Fallacious as the Contract Covers Total Physical Loss, Including Arising From Employee Dishonesty.

Perhaps the most outrageous argument proffered by St. Paul is the argument that the complete loss of property is not covered by any of the insurance contracts. In support thereof, St. Paul cites language from the

St. Paul policy which clearly states that St. Paul will protect covered property against risks of direct physical loss.

Under St. Paul's argument, Emerald Solutions' failure to return property of which it previously acknowledged receipt is not a complete physical loss to NCF.

St. Paul cites Couch on Insurance, but the citation recognized that physical, given the ordinary definition of that term, is widely held to exclude alleged losses that are **intangible or incorporeal**, and thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by distinct, demonstrative, physical alteration of the property. 10 Couch on Insurance, § 148:46 (3d ed.) (emphasis added).

However, NCF's loss is not intangible, but rather physical. Its property was not returned. In this connection, it is worthy to note that the St. Paul contracts include coverage for employee dishonesty, too.

In addition, the cases cited by St. Paul for support of this absurd proposition are completely distinguishable. In Wolstein v. Yorkshire Ins. Co. Ltd., 97 Wash. App. 201, 212-13, 985 P.2d 400 (1999), that Court cited Trinity Industry, Inc. v. Insurance Company of North America, 916 F.2d 267, 270-271 (5th Cir. 1990). The Trinity Court recognized that

Courts have used broad language in describing the extent of coverage provided by an all risk policy, but it was convinced that neither party intended for the builder's risk policy to cover the cost of repairing mistakes in construction. In distinguishing previous cases where coverage was found to exist, the Trinity Court noted that those cases dealt with accidents "caused by defective workmanship, not with the cost of replacing or repairing defective workmanship."

After discussing why builder's risk policies cover accidents resulting from the insured's defective workmanship, the Court concluded that "the language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state." Id. at 270-71.

This case is completely distinguishable from the instant case because it deals with the issue of damage not complete physical loss. Indeed, even in Wolstein the Court recognized that the insured's object must sustain actual damage or be physically lost to invoke all risk coverage.

In the instant case, there is no question that the subject equipment was not returned to NCF. Moreover, Emerald Solutions is no longer in existence.

As to NCF, its equipment is physically lost. The reason for that loss may very well be a question of fact, but that question of fact does not alter the fact that NCF's property is lost.

In Fujii v. State Farm Fire & Cas. Co., 71 Wash. App. 248, 857 P.2d 1051 (1993), again the facts are wholly distinguishable. The insured sought property and insurance coverage arising from the risk of imminent harm from a landslide. However, at the time of making the claim, no physical damage had yet been incurred. Thus, the Court recognized that a claim could not be made at that point without discernable physical damage. Clearly that case does not stand for the proposition that personal property which is stolen is not a complete physical loss to an insured.

Similarly, in Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 793 F. Supp. 259 (1990), *affirmed* 953 F.2d 1387 (9th Cir. 1992), the presence of asbestos had not, at that point, physically damaged the house. Again, this case involved physical damage to real property, wholly distinguishable from a loss of personal property which was not returned to a lessor by the lessee.

Lastly, it is of singular interest that St. Paul fails to discuss that this policy has a benefit for employee dishonesty. If one takes St. Paul's argument at face value, if an individual is walking through the hall at

Emerald Solutions' premises and is robbed at gunpoint and has his laptop computer stolen, that loss is not covered because Emerald Solutions could not point to any physical damage to the laptop; albeit the laptop was stolen and lost forever. Obviously, the argument is absurd.

F. NCF had the Right to make its Claim as an Additional Insured as Found by the Trial Court.

The Trial Court, as noted in the Record of the Proceedings, made the finding that NCF was an additional insured under the contract. As has been repeatedly recognized by the Courts without need of citation, a finding of fact will not be disturbed if supported by substantial evidence. In this case, there was overwhelming evidence of a history of NCF being designated as an additional insured from 1999 onward. There was substantial evidence to document that Emerald Solutions was a subsidiary of Emerald Delaware, Inc. and merged into the same upon Emerald Delaware, Inc.'s filing bankruptcy. The Evidence of Property Insurance Certificate dated June 22, 2002 confirmed an effective date of May 11, 2000 and that coverage would continue until terminated.[1]

That Certificate stated the following:

> This is evidence that insurance as identified below has been issued, is in force, and conveys all the rights and privileges afforded under the policy.

[1] See, Evidence of Property Insurance, Appendix 1, CP 41, pg. 288.

That Certificate also provided:

> Should the policy be terminated, the company will give the additional interest identified below 30 days written notice and will send notification of any changes to the policy that would affect that interest, in accordance with the policy provisions or as required by law.

There was substantial evidence that the second policy referenced under the aforedescribed Evidence of Property Insurance Certificate was replaced with a new identical policy during the bankruptcy period, which change was never communicated to NCF, in breach of the warranties set forth in the aforedescribed Certificate and in violation of the insurance contract's own provisions, and in violation of Washington law under the holding of Olivine v. United Capital Ins. Co., 147 Wn.2d 148, 52 P.2d 494 (2002).

Thus, the Trial Court properly recognized that NCF's interest as an additional insured carried over to the substituted contract.

As such, the two year limitation clause defense is moot as NCF's claim arose during the term of the third policy when its property was not returned and suit was properly filed within the required two year period.

G. St. Paul Misconstrues the Court's Holding in Postlewait Constr. v. Great American Ins. Co., 106 Wn.2d 96, 99, 720 P.2d 805 (1986).

Postlewait, on which St. Paul relies so heavily, recognizes that a third party beneficiary contract is created if parties intend that the promissor assume a direct obligation to the intended beneficiary at the time they enter into the contract.

In Postlewait the lessee was a named insured on the policy; the lessor, however, was not referred to in the policy, either as a named insured, a loss payee or otherwise. The lessor received two Certificates of Insurance informing the lessor that lessee had purchased insurance. The Court found that the delivery of the Certificate of Insurance in and of itself created no direct right of the lessor in the insurance contract. In making such holding, the Court specifically embraced Judge James Ben McInturfs' opinion where he stated:

> However, the certificates themselves do not identify [the lessor] as having an ownership or any other interest in the cranes, and [the lessor] has not cited any authority to support an inference that such certificates are issued only to persons with an interest....

Id. at 100.

Thus, Postlewait is completely distinguishable from the case at bar as the subject Evidence of Property Insurance Certificate clearly represents that NCF is an additional insured under the policy.

Moreover, the Postlewait decision is silent as to whether that particular insurance contract covered "other persons property," which is specifically covered under the insurance policies at issue in the instant case.

Postlewait, therefore, does not stand for the proposition that an additional insured named in a certificate is not a third party beneficiary which can make a direct claim under insurance contract, but simply stands for the proposition that absent any evidence of such intent, a direct claim cannot be made. Clearly, under the facts present in the instant case, NCF is a third party beneficiary which had the right to make a direct claim against St. Paul.

Of further interest is the Court's recognition in Postlewait that its decision did not strip the lessor in that case of a remedy. The Court specifically recognized that the lessor could sue the lessee and, upon obtaining judgment, garnish the insurer. Id. at 101.

This Court can certainly take judicial notice of the Emerald Solutions' judgment and its effect. It is without doubt that NCF presently

could assert a direct claim against St. Paul by way of garnishment as noted in Postlewait, which St. Paul would certainly challenge on the basis of the defenses raised herein. Certainly in the interest of judicial economy it makes sense to address the issues before the Court presently, recognizing that if NCF proceeded with garnishment as noted in Postlewait, the defenses raised therein would be identical to the ones raised presently.

H. Emerald Solutions' Assignment Allows NCF to Bring a Direct Claim Against St. Paul Even if it was not an Additional Insured under the Contract.

Substantial evidence was presented to the Trial Court that the St. Paul insurance contract covered "property of others." NCF received an assignment of any and all rights Emerald Solutions/Emerald-Delaware, Inc. had in the St. Paul insurance contract by approval of the bankruptcy court and duly signed by the bankruptcy trustee.

Typically, and as was the case in the Libralter Plastics v. Chubb, 199 Mich. App. 482, 502 N.W.2d 742 (1993) decision, a named insured would bring a claim when it has damaged or lost the property of others. In effect, that is a chose in action which can be assigned. Indeed, St. Paul recognizes that Washington law allows for such assignment of rights if the assignment is done to transfer a right to collect on a claim which occurs

after the loss. See, Kagele v. Aetna Life & Cas. Co., 40 Wash. App. 194, 197, 698 P.2d 90 (1985).

However, St. Paul has the audacity to claim that that did not occur in the present circumstance as no formal claim was submitted by Emerald Solutions. This assertion is hard to comprehend because the assignment in effect assigned that chose in action to NCF. The assignment, under Washington law, clearly allowed NCF to make a direct claim against St. Paul for its loss. The assignment of the chose in action did not prejudice St. Paul in any circumstance.

Indeed, at the summary judgment motion, NCF conceded that should the Court find that it was not an additional insured (which, of course, the Trial Court did make such finding), NCF would have to (as standing in the shoes of Emerald Solutions) provide some tangible facts and circumstances of what happened to the property while it was in Emerald Solutions' possession, pursuant to the rationale of the Blasiar Court.

As noted previously, NCF provided such tangible facts and circumstances to shift the burden to St. Paul, and create the question of fact necessitating the denial of the motion for summary judgment.

Lastly, the assertion that St. Paul could face uncalculated exposure if Emerald Solutions brought a claim against St. Paul for injury that occurred before the dissolution is nonsensical. Emerald Solutions transferred all rights it had in the insurance contract arising out of the NCF claim. If a separate claim was available to Emerald Solutions that claim would be wholly distinguishable from the subject claim. Emerald Solutions, after the assignment, had no basis to assert a claim on its own arising out of NCF's claim. Thus, the suggestion that St. Paul could face additional uncalculated exposure is not only without merit, it is fantasy.

II. CONCLUSION

At its heart, NCF's claim is very simple. NCF (as found by the Trial Court) was an additional insured with rights to make a direct claim against St. Paul. The St. Paul disappearance exclusion, while a part of the insurance contract, simply did not become operative in the subject case because the fact pattern clearly showed that NCF did not lose the equipment for which it was making a claim by disappearance while in NCF's possession. NCF showed what it did with the property. Whatever reason why Emerald Solutions did not return the same, that reason did not operate to make the disappearance clause applicable. The Trial Court

failed to apply the exclusion as it related to NCF, but applied it as it related to Emerald Solutions.

In addition, the Trial Court failed to remand for trial the property claim for property returned in a damaged state.

Lastly, the Trial Court failed to recognize that there were some tangible facts and circumstances under which a Trier of Fact could conclude theft was the reason for the failure of Emerald Solutions to return NCF's equipment.

It is respectfully requested that this Court remand this matter for trial on its merits.

RESPECTFULLY SUBMITTED on January 6, 2006.

OSERAN, HAHN, SPRING & WATTS, P.S.

By 
DAVID M. TALL, WSBA #12849
Attorneys for Plaintiff/Appellant NCF Financial, Inc.

PROOF OF SERVICE

TO: Clerk, Division One, Court of Appeals

AND TO: Defendant/Respondent

PLEASE TAKE NOTICE on the 10th day of January, 2006, Reply Brief of Appellant was filed with Division One, Court of Appeals and served via ABC Legal Messengers, Inc. on the following:

Lawrence Gottlieb
Gordon & Polscer, LLC
1000 Second Avenue, Suite 1500
Seattle, WA 98104

Dale L. Kingman
Kingman, Peabody, Pierson & Fitzharris, P.S.
505 Madison Street, Suite 300
Seattle, WA 98104

Dated this 10th day of January, 2006.

Laura Faulstich, Legal Assistant

ACORD. EVIDENCE OF PROPERTY INSURANCE

DATE (MM/DD/YY): 06/22/2000

THIS IS EVIDENCE THAT INSURANCE AS IDENTIFIED BELOW HAS BEEN ISSUED, IS IN FORCE, AND CONVEYS ALL THE RIGHTS AND PRIVILEGES AFFORDED UNDER THE POLICY.

PRODUCER | PHONE (A/C, No, Ext):

Marsh Advantage America
1215 Fourth Ave, Suite 600
Seattle, WA US 98161

Marsh Advantage America is a service of Seabury & Smith, Inc.

CODE: | SUB CODE:

AGENCY CUSTOMER ID #:

COMPANY

St. Paul Fire and Marine Insurance Company

INSURED

Emerald Solutions, Inc
500 108th Ave NE Ste 1800
Bellevue, WA 98004

LOAN NUMBER	POLICY NUMBER
	TE01900068

EFFECTIVE DATE	EXPIRATION DATE	CONTINUED UNTIL TERMINATED IF CHECKED
05/11/2000		X

THIS REPLACES PRIOR EVIDENCE DATED:

PROPERTY INFORMATION

LOCATION/DESCRIPTION

Leased Equipment

COVERAGE INFORMATION

COVERAGE/PERILS/FORMS	AMOUNT OF INSURANCE	DEDUCTIBLE
Blanket Personal Property 100% RCV Agreed Value Special Form	$1,017,677	$1,000

REMARKS (Including Special Conditions)

Certificate Holder is named as Additional Insured as respects equipment leased by the Named Insured, per Master Lease 99-11090, Supplementary Schedule No. 001.

CANCELLATION

THE POLICY IS SUBJECT TO THE PREMIUMS, FORMS, AND RULES IN EFFECT FOR EACH POLICY PERIOD. SHOULD THE POLICY BE TERMINATED, THE COMPANY WILL GIVE THE ADDITIONAL INTEREST IDENTIFIED BELOW 30 DAYS WRITTEN NOTICE, AND WILL SEND NOTIFICATION OF ANY CHANGES TO THE POLICY THAT WOULD AFFECT THAT INTEREST, IN ACCORDANCE WITH THE POLICY PROVISIONS OR AS REQUIRED BY LAW.

ADDITIONAL INTEREST

NAME AND ADDRESS

NCF Financial
Attn: Linda Wrenn
P.O. Box 576
Bellevue, WA 98009

	MORTGAGEE	X	ADDITIONAL INSURED
	LOSS PAYEE		

LOAN #

AUTHORIZED REPRESENTATIVE

Diane Rhoads

ACORD 27 (3793)

APPENDIX 1

PROOF OF SERVICE

TO: Clerk, Division One, Court of Appeals

AND TO: Defendant/Respondent

PLEASE TAKE NOTICE on the 10th day of January, 2006, Reply Brief of Appellant was filed with Division One, Court of Appeals and served via ABC Legal Messengers, Inc. on the following:

Lawrence Gottlieb
Gordon & Polscer, LLC
1000 Second Avenue, Suite 1500
Seattle, WA 98104

Dale L. Kingman
Kingman, Peabody, Pierson & Fitzharris, P.S.
505 Madison Street, Suite 300
Seattle, WA 98104

Dated this 10th day of January, 2006.

Laura Faulstich

Laura Faulstich, Legal Assistant